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No. 99-765

In The

Supreme Court of the United States

CSC CONSULTING, INC.,

Petitioner,

v.

TINGLEY SYSTEMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, CSC Consulting, Inc. hereby refers to the Corporate Disclosure Statement appearing at page ii of CSC Consulting, Inc.'s Petition for Writ of *Certiorari*.

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REPLY

The Petitioner, CSC Consulting Inc. ("CSC"), submits this reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari (hereafter, the "Opposition"). This Reply is limited to two new points raised by respondent, Tingley Systems, Inc. ("TSI"), in the Opposition.

I.

TSI claims that "the limited issue decided by the First Circuit – whether 'the consolidated cases should have been treated as a single action for res judicata purposes' – does not conflict with any other case." *Opposition* at 8. TSI does not explain why, in its view, the First Circuit's decision of that issue does not necessarily implicate the severely conflicted jurisprudence of the courts of appeals regarding the effect of consolidation in other procedural contexts upon the parties' rights. But even if, for the sake of argument, "the issue decided by the First Circuit" is construed as narrowly as TSI would like, it is nevertheless not true that the First Circuit's decision "does not conflict with any other case." *Opposition* at 8. As the First Circuit expressly recognized, *Bay State HMO Management, Inc. v. Tingley Sys., Inc.*, 181 F.3d 174, 180 n. 4 (1st Cir. 1999), its decision directly conflicts with the decision of the district court in *Booth v. Quantum Chem. Corp.*, 942 F. Supp. 580 (S.D. Ga. 1996) – the only other federal court (apart from the district court in this case) to have decided the precise issue of the preclusive effect of a judgment rendered in a consolidated case upon a companion case

as of the time of the filing of CSC's Petition for Writ of *Certiorari* (the "Petition").[1]

TSI nevertheless contends that the First Circuit's decision is not inconsistent with the "only three other federal circuit courts which have considered this issue, either directly or indirectly. . . . " *Opposition* at 9. There are two reasons why this argument fails. First, the cases to which TSI refers, whether or not consistent with the First Circuit's decision in this case, illustrate why this case warrants review by this Court. In *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121 (2d Cir. 1999), the Second Circuit considered the district court's dismissal of certain claims alleged in a suit between the parties based on the preclusive effect of a judgment entered in a prior action between them. In a separate opinion, the Second Circuit vacated the judgment in the first action upon which the district court's application of res judicata in the second action had been premised. In light of that decision, the court held that res judicata did not bar the second action. *Id.* 130. Nevertheless, certain *dicta* in its decision indicates that the *Devlin* Court was under the impression that the consolidation of the two cases by the trial court under Rule 42 – a possibility due to "the fortuitous circumstance that the same district judge had both [cases] on his active docket at the same time," *id.* – would have avoided the application of the res

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[1] Among the federal courts which had considered this issue in *dicta*, the First Circuit's decision certainly conflicts with the district court's treatment of the issue in *Robinson v. Worthington*, 544 F. Supp. 949, 952 (M.D. Ala. 1982), as the First Circuit recognized. *Bay State*, 181 F.3d at 179-80.

judicata doctrine. This impression, however, was not supported by any analysis of the effect of consolidating the two cases. Presumably because the parties had no occasion to either brief or argue the effect of a consolidation order upon the application of the res judicata doctrine in the second case,[2] the *Devlin* Court's *dicta* about the outcome-determinative effect of consolidating the cases was premised upon its tacit assumption that such a consolidation would somehow have precluded the defendant from asserting the judgment entered in the first case as a bar to the continued litigation of the second case. The court's opinion made no mention of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933), or any other case dealing with the effect of consolidation orders. Nor did the *Devlin* Court consider whether, under its view of consolidation, the rights of the parties would be affected and, if so, whether its *dicta* was consistent with its own prior cases holding that, under *Johnson*, consolidation "does not change the rights of the parties in the separate suits." *Cole v. Schenley Indus., Inc.*, 563 F.2d 35, 38 (2d Cir. 1977). In short, *Devlin* is one of many examples of decisions construing the effect of consolidation orders without regard either to this Court's relevant decisions, to the decisions of other courts which have considered the question, to prior inconsistent decisions of the same court considering the question, or to

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[2] Not only had the two cases in *Devlin* never been consolidated, but no party to the cases had ever sought consolidation by the district court. The Second Circuit noted, however, that the district court could have consolidated the cases *sua sponte*, and its discussion of the effect of consolidation was premised upon that possibility. *Devlin*, 175 F.3d at 130.

any underlying principle animating the court's view of the effect of consolidation. For this reason, the *Devlin* Court's conclusory discussion of consolidation does not undermine CSC's argument that this Court should grant *certiorari* in this case. To the contrary, *Devlin* is the kind of case that illustrates why the questions presented by CSC's Petition warrant this Court's review.

So, too, is *Langston v. Insurance Co. of N. Am.*, 827 F.2d 1044 (5th Cir. 1987), which TSI also cites. *Opposition* at 9. *Langston* involved two suits brought by the same plaintiff against the same defendants arising out of the same cause of action. These actions were pending before the same district court, but had been assigned to different judges. Upon the entry of judgment in one of the actions, the defendant moved for summary judgment under the doctrine of res judicata in the other. In deciding that res judicata barred the second action, the district judge, whose opinion was adopted by the court of appeals, regarded the question of whether the claims alleged in the second action could have been asserted in the first action as dispositive. The court held that the claims alleged in the two cases could have been combined in a single action by way of amendment to the complaint in the first-filed case in view of the general rule liberally permitting amendments to pleadings when justice so requires. *Id.* 1048. The court then went on to observe that

> [m]oreover, plaintiff could very well have sought consolidation of [the two cases] pursuant to Rule 42(a) . . . Nonetheless, plaintiff, who controlled the tactical decisions in the contest between the parties, made no attempt to either

> amend [his complaint in the first action] or consolidate [the two actions]. . . .

Id. This is the entire extent of the *Langston* Court's analysis of the question whether consolidation of the actions would have precluded the application of res judicata in the second case notwithstanding the entry of judgment in the first.

Like *Devlin*, the decision in *Langston* makes no mention of any authority dealing with the effect of consolidation orders.[3] Moreover, the *Langston* Court's view of consolidation is not consistent with the Fifth Circuit's subsequent decision in *In re Excel Corp.*, 106 F.3d 1197, 1201 (5th Cir.), *cert. denied*, 522 U.S. 859 (1997) ("[w]e have adhered to [*Johnson*] after the adoption of Rule 42(a)"). Consequently, like *Devlin*, the decision in *Langston* merely illustrates the conflicting approaches of the courts of appeals to determining the effect of consolidation orders in various procedural contexts.

The decision in *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984), the final case upon which TSI relies for its argument, *Opposition* at 9, also supports the review sought by CSC's Petition, albeit for a different reason. *Hagee* involved the application of the doctrine of res judicata to a judgment rendered by an Illinois state court. Applying Illinois law in holding that the state court judgment precluded further litigation of a federal case between the same parties arising out of the same cause of action, the Seventh Circuit observed that "[t]he principle

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[3] As in *Devlin*, the cases at issue in *Langston* had never been consolidated, and the parties therefore had no reason to brief or argue the effect of consolidation.

that res judicata extends to all matters within the purview of the original action, whether or not they were actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit." *Id.* 514 (footnote omitted).

Notwithstanding that this passage uses a form of the same word that appears in Rule 42 – *i.e.*, "consolidation" – it is plain from the context of the Seventh Circuit's observation that the court was not referring to the same thing. The two suits at issue in *Hagee* were pending before different sovereigns; a court-ordered consolidation of the plaintiff's actions was therefore not possible. Instead, what the Seventh Circuit said in *Hagee* is essentially what CSC argued to the First Circuit below: res judicata requires that a party assert all claims arising out of the same cause of action against the same party or its privies in "one suit" (*i.e.*, the *party* must "consolidate" its own claims), in the absence of a good reason why the claims cannot be so joined. Thus, contrary to TSI's argument, and contrary to the First Circuit's reading of the case, *Bay State*, 181 F.3d at 181 n. 5, the decision in *Hagee* is *not* consistent with the First Circuit's decision in this case. To the extent that the "consolidation" principle which animated *Hagee*'s application of the res judicata doctrine under Illinois law is also relevant to the application of the federal doctrine, that principle conflicts with the First Circuit's decision in this case. Consequently, the decision in *Hagee* supports CSC's argument that this Court should grant review on *certiorari* in this case.

TSI's argument must be rejected for a second reason. Since the filing of CSC's Petition, the Third Circuit has decided *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999),

amended on other grounds by Nos. 96-7623, 96-7624, 96-7625, 2000 WL 18950 (3d Cir. Jan. 4, 2000). *TMI* involved the personal injury claims of more than 2,000 plaintiffs arising out of the Three Mile Island nuclear incident. The cases had been consolidated by the district court. By agreement of the parties, the claims of certain of the plaintiffs (the so-called "Trial Plaintiffs") were selected for "mini-trial." Prior to trial, the district court excluded certain expert testimony that the Trial Plaintiffs intended to offer on the issue of causation. In view of that ruling, the district court then held that there remained no genuinely disputed issues of material fact for trial, and entered summary judgment against the Trial Plaintiffs. *Id.* 623. The district court then extended this summary judgment to the claims of the remaining plaintiffs (the so-called "Non-Trial Plaintiffs") on the ground that the consolidation of the cases warranted the exclusion of expert testimony which they might seek to offer on the causation issue as well. *Id.* 628.

On appeal, the Third Circuit affirmed the entry of summary judgment against the Trial Plaintiffs, but reversed the entry of summary judgment against the Non-Trial Plaintiffs. In so holding, the *TMI* Court identified the "primary inquiry" as requiring it to "determin[e] the effect of consolidation on the substantive rights of the parties in the consolidated cases." *Id.* 723. Applying this Court's decision in *Johnson*, the *TMI* Court answered this inquiry by holding "that consolidation cannot affect the substantive rights of the parties to the consolidated cases. . . ." *Id.* 725. The Court thus reversed the district court's extension of the preclusive effect of the summary judgment decision entered upon the claims of the Trial

Plaintiffs to the claims of the Non-Trial Plaintiffs on the ground that it altered the substantive rights of the parties.

The plaintiffs in *TMI* were not in privity, and the case admittedly did not involve the application of the doctrine of res judicata. It did, however, involve determining the preclusive effect of a federal judgment entered in a consolidated case upon its companion cases, and in *TMI*, as in this case, that inquiry turned exclusively upon the effect of the consolidation order entered by the district court. The *TMI* Court's insistence that consolidation could not affect the substantive rights of the parties in determining the effect of the judgment entered upon the claims of the Trial Plaintiffs unquestionably conflicts with the First Circuit's treatment of consolidation in the context of determining the effect of the judgment entered in the Bay State cases. For this additional reason, this Court should grant review in this case.

II.

TSI suggests that CSC is not in a position to criticize the First Circuit's decision to the extent that it relied upon "equitable considerations" in applying the res judicata doctrine, since CSC itself "raised equitable issues in response to [TSI's] arguments in CSC's brief to the First Circuit. . . . " *Opposition* at 15. In support of this argument, TSI cites certain portions of the text of CSC's brief which it has extracted and appended to its Opposition. This argument is disingenuous. TSI argued to the First Circuit that the district court's application of the res judicata doctrine was inequitable because it led to a "harsh" result in this case. In response to this contention,

CSC argued that "applicable authority makes clear that this argument must be rejected." *Brief of Appellee CSC Consulting, Inc.* ("Appellee's Brief") at 47. In support of this argument, CSC cited the First Circuit's decision in *United States v. Cunan*, 156 F.3d 110 (1st Cir. 1998). *Appellee's Brief* at 47. In *Cunan*, the First Circuit in turn cited this Court's decision in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), and characterized it as having "discouraged if not forbidden resort to equity as a way of avoiding res judicata." *Cunan*, 156 F.3d at 119.

In short, CSC argued to the First Circuit that the equitable considerations which TSI had raised were not material to the application of the res judicata doctrine, but that, to the extent that the First Circuit thought otherwise[4], these considerations cut against TSI. Given this position before the First Circuit, it is hardly "remarkable," *Opposition* at 15, that CSC would argue to this Court that the First Circuit's reliance on "equitable considerations" as an alternative ground for its decision that the doctrine of res judicata did not bar the litigation of TSI's claims in the CSC case constitutes a reason why this Court should grant *certiorari* in this case. To the contrary, in view of the decisions by other courts of appeals in the wake of *Moitie* rejecting equitable considerations as a factor in the application of the res judicata doctrine, *Petition* at 23-24, the First Circuit's reliance upon those considerations in this case presents exactly the kind of

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[4] As noted in CSC's Petition, a line of cases decided by the First Circuit after *Moitie* has taken the position that a federal court may make an "occasional exception" to the application of the res judicata doctrine on equitable grounds. *Petition* at 24.

conflict among the circuits that is appropriate for resolution by this Court.

CONCLUSION

For the additional reasons set forth hereinabove, petitioner CSC Consulting, Inc. prays that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeal for the First Circuit in this case.

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